Supreme Court, U.S.
FILED
JAN 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-867 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLIE J. HODGES, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that substantial evidence supports the decision of the Merit Systems Protection Board sustaining the agency's removal of petitioner for participating in a strike against the United States and for being absent without leave.

2. Whether the court of appeals correctly determined that petitioner's removal was neither arbitrary nor capricious.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19-20) is unreported. The opinions of the Merit Systems Protection Board (Pet. App. 21-49) are also unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 50) was entered on July 24, 1985. Petitioner's petition for rehearing was denied on August 21, 1985 (Pet. App. 51). The petition for a writ of certiorari was filed on November 18, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges his removal from federal employment following the air traffic controllers' strike in 1981. The background of the strike and the subsequent litigation are

set forth in our Brief in Opposition in *Campbell* v. *Department of Transportation, FAA*, No. 84-78, in response to one of a number of other petitions arising out of the strike.[1]

1. Petitioner was removed from his position as an air traffic controller on the grounds that he participated in a strike against the United States and was absent without leave during the strike. He appealed to the Merit Systems Protection Board (MSPB or Board), where he was afforded a hearing (consolidated with a number of other cases). The agency established a prima facie case by demonstrating that petitioner was absent without leave during a strike of general knowledge.[2]

Petitioner contended that he was on annual leave at the time the agency concluded he was striking. The presiding official found, however, that petitioner's annual leave had been cancelled (Pet. App. 38-39). This finding was based upon testimony of the chief of the facility at which petitioner worked that a memorandum cancelling all leave in the event of a strike was placed in a mandatory "read and initial" binder for each sector (*id.* at 29). This memorandum, dated June 16, 1981, provided that it was effective until further notice (*ibid.*). The presiding official also

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[1]A copy of our response in *Campbell* has been sent to counsel for petitioner.

[2]The standard applied requires that the agency at all times bear the burden of persuasion with respect to strike participation; the agency must show by a preponderance of the evidence that the employee withheld his services in concert with others. *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477, 482-483 (Fed. Cir.), cert. denied, No. 84-258 (Nov. 13, 1984). Once the agency has made a prima facie showing by evidence of the employee's unauthorized and unexplained absence during a strike of general knowledge, "the burden of going forward with evidence to rebut that showing necessarily shifts to the employee, who is in the best position to present explanatory evidence to counter that showing." 735 F.2d *id.* at 482. See Pet. App. 26, 37-41.

concluded that petitioner had notice of the cancellation of his leave (*id.* at 39-40). "While [petitioner was] initially granted approved leave, the only evidence before me indicates that [he was] on notice that annual leave would be cancelled in the event of a strike" (*id.* at 40). In this regard, petitioner's facility chief testified that each controller was required each day to read the memoranda in the binder before he began controlling traffic (*id.* at 29). Moreover, while the agency did not present evidence that petitioner had actually initialed the memorandum, the facility chief testified that he had instructed that the memoranda be distributed and that he had confirmed through conversations with his deputy that the distribution had been accomplished (*id.* at 29-30, 39).

Notwithstanding this evidence, petitioner elected not to testify and never denied having had notice of the leave cancellation (Pet. App. 35). Indeed, the only response petitioner made to his proposed removal was "the standard PATCO [written] response" (*id.* at 32). Accordingly, the presiding official concluded that "the agency has established by preponderant evidence that [petitioner was] striking and AWOL" (*id.* at 41).

The full Board denied petitioner's petition for review (Pet. App. 21-24). The Board found that it had already resolved many of the issues presented, and that "[t]he presiding official's findings as to those legal issues [presented to her] are essentially consistent with ours, and any inconsistency in the presiding official's determination on those issues would not affect the outcome of this appeal" (*id.* at 22; footnote omitted). The Board also found that, "to the extent that the arguments made in the * * * petition relate to the presiding official's factual determinations, we find that [petitioner has] not demonstrated any such factual error by the presiding official, based on specific references to the record, sufficient to warrant the Board's full review of the record" (*id.* at 22-23; citation omitted).

2. Petitioner then sought review in the United States Court of Appeals for the Federal Circuit His was one of approximately 3,500 similar petitions filed in the court of appeals by discharged air traffic controllers. All but nine cases were stayed pending the court's decisions in those "lead cases." On May 18, 1984, a five-judge panel of the court of appeals issued 11 decisions sustaining the removals of all but one of the petitioners in the lead cases.

A number of the unsuccessful petitioners filed petitions for writs of certiorari; all were denied. See, *e.g.*, *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477 (Fed. Cir.), cert. denied, No. 84-258 (Nov. 13, 1984); *Anders* v. *Department of Transportation, FAA*, 735 F.2d 537 (Fed. Cir.), cert. denied, No. 84-259 (Nov. 13, 1984); *Campbell* v. *Department of Transportation, FAA*, 735 F.2d 497 (Fed. Cir.), cert. denied, No. 84-78 (Oct. 9, 1984). After this Court denied the petitions in the lead cases, the court of appeals lifted the stay of the other pending appeals.

In one of the first decisions issued by the court of appeals after the stay was lifted, the court affirmed the decision of the Board in petitioner's case (Pet. App. 19-20). The court noted that the "sole question" on appeal was whether petitioner had been on annual leave on the day on which he was found to have participated in the strike, and affirmed the decision of the Board that he was not (*id.* at 20).

ARGUMENT

The unpublished and summary decision of the Federal Circuit in this factbound dispute is correct, does not conflict with the decisions of this Court or any other court of appeals, and does not merit further review.

1. The court of appeals correctly found that substantial evidence supports the decision of the Board that petitioner had notice of the cancellation of his leave. The agency presented competent evidence that a notice dated June 16, 1981, was placed in the read and initial binders and that it

cancelled petitioner's leave in the event of a strike. Competent evidence further established that the cancellation was, by its terms, effective until further notice and that petitioner was required to read the notice prior to assuming his duties controlling aircraft. There is no evidence in the record that the notice was ever removed from the binder or that petitioner was unaware of it.[3] Indeed, petitioner did not take the stand to deny that he had notice of the cancellation of his leave. It is entirely proper to infer that truthful testimony would not have served his interests, and therefore to draw an adverse inference from his failure to testify. *Adams* v. *Department of Transportation, FAA*, 735 F.2d 488, 492 (Fed. Cir.), cert. denied, No. 84-258 (Nov. 13, 1984). In any event, because the *only* evidence before the Board established that petitioner was notified of the cancellation of his leave, the court below was clearly correct in finding that the Board's decision was supported by substantial evidence.[4]

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[3]Accordingly, there is no conflict between the decision of the court of appeals and this Court's decisions in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), or *Greene* v. *Lindsey*, 456 U.S. 444 (1982). There are no facts in this case upon which one could conclude that the leave cancellation notice was removed (frequently or otherwise) from the binders or that the notice was not reasonably calculated to apprise petitioner of the cancellation of his leave.

In his petition (at 7-13) and before the court of appeals, petitioner argued that the leave cancellation notice was torn out of the binder and attempted to rely upon evidence contained in the records of other appeals to the Board by other air traffic controllers in other cases. But the Board and the court of appeals were required to render their decisions based upon the record before them. One side cannot rely on non-record evidence when the other side is held to the record. It is simply untenable to contend, as petitioner does, that the court of appeals should have reversed the decision of the Board based upon evidence that was not in the record before the Board or the court.

[4]Because petitioner's leave had been effectively cancelled, his absence *was* unauthorized and he is incorrect in suggesting (Pet. 12-13) that the court of appeals' decision in his case conflicts with its decision in *Schapansky*. Moreover, our discussion above (page 2 note 2) demonstrates that the definition of strike applied in this case is, contrary to

A writ of certiorari is inappropriate where petitioner merely challenges the court of appeals' conclusion regarding the evidentiary support for the decision below. This Court has recognized that the courts of appeals have the principal responsibility for determining substantial evidence questions. *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 309-310 (1974); see 5 U.S.C. 7703(c). There is no indication in the present case that the court of appeals " 'misapprehended or grossly misapplied' " the substantial evidence test. 417 U.S. at 310 (quoting *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951)).

2. Petitioner is also incorrect in contending (Pet. 13-17) that the decision of the Board was arbitrary and capricious because he was treated differently from others who presented "precisely the same facts." The decisions of the Board petitioner cites are readily distinguishable.

In *Carpenter* v. *Department of Transportation*, 17 M.S.P.R. 84 (1983), the Board found that the June 16 notice cancelling annual leave was not sufficient to support the controller's removal. The evidence before the Board was critically different, however, since the controller testified that he was unaware of the June 16 notice and presented evidence that he had been incommunicado on a canoeing and fishing expedition in the Canadian wilderness. No such evidence was presented here.

Benson v. *Department of Transportation, FAA*, 19 M.S.P.R. 596 (1984), is distinguishable since the record there contained evidence that the notice had been removed from the mandatory reading binder. In addition, while petitioner correctly notes (Pet. 10) that the Board in *Benson*

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petitioner's contention (Pet. 12), entirely consistent with *United Federation of Postal Clerks* v. *Blount*, 325 F. Supp. 879 (D.D.C.), aff'd, 404 U.S. 802 (1971).

found the notice ineffective to cancel the leave of two controllers who had actually initialed the notice, he fails to point out that this was because one controller was out of town and unaware of the existence of the strike and the other was misled by a telegram notifying him only to report for his next assigned shift. Petitioner in this case never alleged facts similar to those in *Benson*.

The remaining two cases cited by petitioner — *Coleman* v. *Department of Transportation, FAA*, 21 M.S.P.R. 596 (1984), and *Ailes* v. *Department of Transportation, FAA*, 17 M.S.P.R. 114 (1983) — are, like *Carpenter*, cases in which the controllers denied under oath having ever seen the notices cancelling leave. In view of this important difference in the evidence before the Board, it was not arbitrary for it to decide those cases differently from the present one.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1986

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[5]Petitioner also contends (Pet. 13-14) that the FAA, as well as the Board, treated him differently from others similarly situated — specifically, that the FAA did not discharge other employees on approved annual leave. But there is no showing that for these employees the same evidence of strike participation was available. In any event, the FAA never recognized, "implicitly" or otherwise, that a notice in the read and initial binder was "insufficient."